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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents' counter-statement contains many factual assertions upon which they base their contention that the 1978 Congress found cash bonus bidding defective and, accordingly, required experimentation with alternative systems that do not involve any cash bonus bid.[1] But, at this stage, these are bare allegations. The courts below made no factual findings, since this case was decided on motions for summary judgment and a preliminary injunction. Moreover,

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[1]For example, respondents make assertions concerning the percentage returns to the Government from the cash bonus bid-fixed royalty system (Br. in Opp. 1, 4); the numbers of bidders for tracts (*id.* at 5-6); the acquisition of leases by the top 20 oil companies (*id.* at 5, 23); California's experience with variable net profit share bidding (*id.* at 4, 9, 13, 19); and the conclusions of the General Accounting Office relating to competition and fair return to the Government (*id.* at 6-7, 12). Petitioners dispute the accuracy or implications of these facts.

Congress was informed of most of these allegations during the consideration of the 1978 Amendments (*e.g.*, H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 103-121 (1977)), and nevertheless Congress refused to conclude, as respondents do, that the traditional bidding system was unsatisfactory. Instead, it rejected respondents' recommendation (*id.* at 117) for severe restrictions on the "use of cash bidding" and required the use of the traditional system on at least 40% of all new lease sales (43 U.S.C. (Supp. III) 1337(a)(5)(B)). Respondents simply seek to obtain in the courts what they were unable to obtain from Congress.

To be sure, respondents are not deterred by the congressional rejection by their arguments. Although they have not suggested any alternative interpretation of the clear statutory language cited in our petition, they invoke legislative history as indicating acceptance of their views. The flaw in respondents' case, however, is the erroneous premise that the references in the legislative history to "bonus bidding" or "cash bonus bidding" comprehend all bidding systems having a cash bonus as a bidding component. In fact, as noted in our petition (Pet. 14-15), most such references are to the traditional cash bonus bid-fixed 1/6 royalty bidding system. Respondents thus distort criticisms of this traditional system as applying to *all* bidding systems having a cash bonus as the bidding component.

2. Respondents contend (Br. in Opp. 18, 24) that there is no need for further review of this case because the Departments of Energy and Interior have agreed to promulgate the necessary regulations and to utilize profit share bidding. But, as the public announcements on which respondents rely make clear, the actions of those Departments have been taken only under the complusion of orders issued in the instant action (46 Fed. Reg. 15484, 15462 (1981)).[2] Because

[2]The Department of the Interior's tentative decision to use the alternative bidding system at the proposed lease sale for OCS Lands in the

the lower court's orders have not been stayed, petitioners have had no choice but to proceed to implement them. That obedience to outstanding orders should not be taken as the exercise of the discretion granted by the statute.[3] Instead, both Secretaries continue to urge the Court to grant this petition.

3. In our standing discussion, we noted in our petition that the governmental respondents had failed to allege any specific state leasing activities carried on or to be carried on in the future that will be harmed by the challenged leasing programs. They have still failed to do so, or to establish a nexus between federal experimentation with non-cash bonus bidding systems and greater returns to California from its leasing operations. The governmental entities have accordingly failed to establish their standing to bring this case.[4]

The private parties fare no better. In their opposition, they rely on injuries caused by the alleged "stockpiling" of leases by oil companies (Br. in Opp. 18). But a principle characteristic of the traditional cash bonus bid-fixed royalty system is that it is the system most likely to encourage

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Gulf of Mexico in July 1981 expressly reserves the final decision on the use of the system until after this Court has ruled on this petition (46 Fed. Reg. 15463 (1981)).

[3]Moreover, as noted in our petition (Pet. 16), it is not clear from the decision below whether the Departments may be required to issue more regulations and conduct further experimentation than is presently contemplated. In this connection, we note that on March 13, 1981, the district court ordered "good faith experimentation with non-cash bonus leasing such as leasing under a variable net profit share bidding system" (App., *infra*, 1a).

[4]In addition, it is at least anomalous that the governmental entities base their standing on the argument that the federal bidding systems attract too many bidders, thus impairing California's efforts to lease state lands, while the private respondents assert that they are injured because the same federal bidding systems attract too few bidders to induce adequate competition for federal leases.

the rapid exploration and development of the leaseholds.[5] Thus, there is no nexus between the injury from stockpiling asserted by the consumer respondents and the relief they request.

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

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[5]The high lease acquisition costs under the traditional system tend to induce lessees to conduct operations promptly in order to recoup their costs. In contrast, the relatively low acquisition costs and higher contingency costs of the alternative systems are less apt to encourage rapid development. See Pet. 12, n.13.

DOJ-1981-03

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1633

Energy Action Educational Foundation *et al.*

Plaintiffs

v.

Cecil D. Andrus, Secretary of Interior, *et al.*

Defendants

Filed: Mar. 13, 1981

JUDGMENT ON FIRST CAUSE OF ACTION

Plaintiffs having moved for summary judgment or, in the alternative, for preliminary injunction under the first cause of action of the complaint, asserting violation of the Outer Continental Shelf Lands Act because of defendants' failure to issue regulations for leasing by variable net profit share and other non-cash bonus bidding systems and their continued leasing without recourse to non-cash bonus bidding;

and upon review of this Court's denial of plaintiffs' motion the Court of Appeals for the District of Columbia Circuit having issued on [*sic*] Opinion and Judgment on October 30, 1980, which upheld plaintiffs' legal contention;

Now, therefore, it is hereby ordered, adjudged, and decreed that:

1. The Court finds and declares that during the ongoing 5-year program of experimenting with bidding systems for OCS leasing defendants have a legal duty to undertake good faith experimentation with non-cash bonus leasing

such as leasing under a variable net profit share bidding system.

2. The Court finds and declares that defendants' aforesaid legal duty requires them to promulgate additional bidding system regulations in accordance with the Order previously entered by this Court.

3. Plaintiffs are awarded their costs under the first cause of action. Award of reasonable attorney's fees for work conducted in regard to first cause of action is appropriate under 43 U.S.C. 1349(a)(5) at a time and in an amount to be determined by further appropriate proceedings.

4. This Order grants judgment on the first cause of action; the Court reserves action on the remaining causes of action pending completion of discovery and appropriate further proceedings.

/s/ Norma Holloway Johnson

Norma Holloway Johnson
United States District Judge

Dated: March 13, 1981